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LEGAL REMEDIAL ALTERNATIVES FOR SPOUSE ABUSE IN TEXAS

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I. INTRODUCTION

A. Abuse Defined

"Assault" and "abuse," although often legally indistinguishable, have quite different connotations. Texas law has long defined assault as a criminal act without reference to the circumstances surrounding it.¹ The definition of abuse, on the other hand, incorporates surrounding circumstances. Texas law identifies abuse as violence used by one person against another who stands in a special relationship to that person. Thus, the feature that distinguishes abuse from assault is the relationship between the victim and the assailant. Wife abuse, husband abuse, child abuse, and abuse of the elderly are the most visible and recognized types of abuse.²

Although the terms "wife," "husband," and "spouse" indicate a formal, legal relationship between cohabitants, any useful discussion of abuse extends to any persons living together in an arrange-

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1. TEX. PENAL CODE ANN. §§ 22.01-.08 (Vernon 1974).

2. Child abuse and elderly abuse are, respectively, the first and latest forms of abuse to have produced public reaction. Much has been done in formulating legal responses to child abuse. See, e.g., TEX. PENAL CODE ANN. § 22.04 (Vernon 1974). Far less has been accomplished in preventing abuse of the elderly.

ment that removes them from the traditional concept of criminal assault by one stranger on another. In Texas, family violence has been defined in the newly enacted Family Protection Act as "the intentional use or threat of physical force by a member of a family or household against another member of the family or household"³ This definition realistically avoids the term "wife-beating" as too simplistic a description of abusive relationships. Instead, the Act encompasses the presently recognized range of assaultive conduct within both formal and informal family units.

B. Focus and Methodology

Of the various kinds of abuse described, spouse abuse has received the least attention in relation to its frequency. Therefore, this study and the recommendations made in it address only abuse between adult cohabitants of similar ages. For the purpose of this study, the sex of the victim will play no distinguishing role. Wife abuse is, of course, considerably more common than husband abuse,⁴ but either brand of assault occurs with enough frequency to warrant consideration.⁵

In discussing abuse, commentators tend to stress the evolution of social attitudes from the righteous defense of a husband's right to beat his wife to present concern for a social problem of considerable magnitude.⁶ However, this study will focus on the civil and criminal legal alternatives available in Texas for dealing with abuse and will consider how current and proposed systems may protect victims more effectively and deter abusers.

This study will rely on empirical studies because such observations can reveal the direction legal systems should take and pinpoint the flaws and shortcomings in present legal responses to abuse. Although some of these observations merely acknowledge apparently irremediable systemic deficiencies, on the whole they

3. TEX. FAM. CODE ANN. § 71.01(b)(2) (Vernon 1979).

4. *Domestic Violence and Legislation with Respect to Domestic Violence: Hearings on S. 1728 Before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 18 (1978).

5. Straus, *Wife Beating: How Common and Why?*, 2 VICTIMOLOGY 443, 447-48 (1978).

6. See, e.g., Straus, *supra* note 5, at 444; Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 97 (1980); Comment, *Spouse Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 150 (1979) [hereinafter cited as Comment, *Spouse Abuse*]; Comment, *Wife Beating: Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171, 173 (1979) [hereinafter cited as Comment, *Wife Beating*].

form the essential background for possible reform.

C. *The Scope of Abuse*

The difficulty of assessing the extent of spouse abuse increases the difficulty of finding an effective legal remedy. Abuse, like rape, is far less likely to be reported than other crimes.⁷ Any reported statistical incidence rate probably represents only a fraction of the actual number of abuse cases. In addition, spouse abuse is hard to define in any meaningful statistical manner because of the variety of forms it takes. Some social scientists have established a violence scale for measuring more accurately the kinds and degrees of abuse reported.⁸ This is an important methodological advance, although inaccuracies in reporting continue to plague data collection concerning abuse.

Law enforcement agencies are probably the most common sources of information about abuse. Unfortunately, there is no uniform reporting system for gathering even fundamental information about abuse. Those reports which are taken are often colored by the police officer's perception of the problem and the lack of a clear-cut definition of abusive conduct. Pushing, shoving, slapping, and similar acts may be abuse to one officer and normal communication to another. Medical service agencies, another potential source of information, are not required to report suspected spouse abuse as they are child abuse. However, even if that data were available, Texas has no central information gathering agency. In spite of the failure to document incidents of abuse adequately, the available information shows a need for immediate action. The lack of an adequate information gathering system itself suggests the monumental proportions of the problem.⁹

7. Comment, *Wife Beating*, *supra* note 6, at 174.

8. Straus, *supra* note 5, at 448.

9. One of the most widely quoted studies on the incidence of abuse concluded from a sample of 2,143 couples that approximately 1.8 million American wives are abused by their husbands on a yearly basis. *Id.* at 445. For purposes of this study, only acts carrying a high risk of serious injury to the victim were considered. When one takes into account the under-reporting tendencies in this kind of study, statisticians estimate that fifty or sixty percent of all couples experience some level of abuse, rather than the twenty-eight percent who reported it. *Id.* at 447. If this estimate is correct, approximately twelve million wives can expect to experience abuse from their husbands. Other studies have estimated that one-third to one-half of married women have been subjected to spousal violence. Taub, *supra* note 6, at 95. Another researcher estimated that from one million to twenty-eight million women are battered. Comment, *Wife Beating*, *supra* note 6, at 174. These estimates suggest that

The unavailability or unreliability of statistics on the incidence of spouse abuse in Texas is largely due to a historical indifference to abuse as a major social concern. It is clear, however, that the number of cases of spouse abuse in Texas alone may be in the millions.

II. THE NATURE OF SPOUSE ABUSE

Before turning to a discussion of the three broad categories of legal remedies for abuse and their respective levels of adequacy, one must have some understanding of the circumstances of abuse. To combat abuse, one must appreciate its character, participants, and impact.

A. Violent Abuse

Statistics from the 1978 Uniform Crime Reports for reported murders and non-negligent homicides in which a husband or wife was the victim indicate that 4.3% of the men killed nationally were killed by their wives.¹⁰ For the same year, 5.6% of the women killed died at the hands of their husbands.¹¹ These percentages mean that approximately 804 husbands were killed by their wives and 1047 wives by their husbands.¹² In all, over 1850 spouses were killed by their partners.¹³

The incidence of spousal homicide in Texas is difficult to determine because of the way statistics are reported, but some fairly accurate guesswork may be attempted. In 1978, 1853 murders and non-negligent manslaughter crimes were reported in Texas.¹⁴ An extrapolation of national percentages indicates that approximately 183 people were killed by their mates in Texas during 1978.¹⁵ The

abuse is dangerously close to being the rule rather than the exception.

10. CRIMINAL JUSTICE CENTER, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1980, at 312 (1981) [hereinafter cited as SOURCEBOOK—1980].

11. *Id.*

12. *Id.*

13. *Id.* See also Fields, *Representing Battered Wives, Or What to Do Until the Police Arrive*, 3 FAM. L. REP. (BNA) 4025, 4027 (Apr. 5, 1977).

14. SOURCEBOOK—1980, *supra* note 10, at 306.

15. *Id.* at 312. In 1977, the Texas Department of Public Safety extracted its own data of crime in Texas before the information was further distilled for inclusion in the national statistics. See TEX. DEP'T PUB. SAFETY, CRIME IN TEXAS (1977). Those figures more accurately reflect the scope of spousal homicide in Texas. A total of 159 homicides occurred involving husbands and wives. *Id.* at 17. Another 48 involved common-law marriages, and 14 former spouses died. *Id.* Boyfriends and girlfriends accounted for an additional 21 deaths.

expansion of the definition of "spouse" to more realistic parameters would increase dramatically the number of people included.

These deaths—the most concrete evidence of spousal abuse—demonstrate the significance of the problem. Clearly, most of the deaths do not occur as the result of the first abusive episode.¹⁶ One may logically assume that each death represents the culmination of many assaults.

Spousal assault is far more common than spousal homicide. In 1969, Mulvihill and Tumin examined the records of nearly 1500 aggravated assaults for, among other factors, the personal relationship between the victim and offender.¹⁷ Aggravated assaults between husbands and wives, whether the marriage was formal or common law, accounted for 9.4% of the total, and an additional 2.9% were attributed to those in a relationship defined as "par-amour."¹⁸ Not surprisingly, the same study revealed that 26.3% of all aggravated assaults occurred in the home, an environment surpassed only by the street as the scene of such assaults.¹⁹

In 1978, police reported aggravated assaults numbering 28,475 in Texas²⁰ and 534,592 nationally.²¹ The figures of Mulvihill and Tumin, when applied to these reported offenses, indicate that as many as 3787 aggravated assaults between spouses or cohabitants could have occurred in Texas during the same year, and as many as 71,233 nationally for that period.²²

One must remember that these figures, as high as they are, reflect only those offenses known to police and may not always reflect the seriousness of the assault. Since underreporting is common in spouse abuse,²³ figures on aggravated assault between mates may be highly inaccurate.²⁴

Id. Altogether, 242 people were killed by someone with whom they had experienced ties of affection or marriage at some time. *Id.*

16. Taub, *supra* note 6, at 96; Comment, *Spouse Abuse*, *supra* note 6, at 156.

17. CRIMINAL JUSTICE CENTER, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1973, at 197 (1973) [hereinafter cited as SOURCEBOOK—1973].

18. *Id.*

19. *Id.* at 196.

20. SOURCEBOOK—1980, *supra* note 10, at 306.

21. *Id.* at 308.

22. SOURCEBOOK—1973, *supra* note 17, at 197.

23. Straus, *supra* note 5, at 447.

24. A recent and alarming study of spousal assaults in Kentucky indicates that 4.1% of the married women in that state experienced severe abuse during the 12 months preceding the study. Over 33,000 wives or cohabitating partners experienced assault that would constitute aggravated assault or class A misdemeanor assault in Texas, and nearly 70,000

B. *Nonviolent Abuse*

The most common form of nonviolent abuse is verbal. Purely verbal abuse, without any element of threat or incitement to a breach of the peace, cannot be regulated without conflict with first amendment protections.²⁵ The Texas Penal Code specifically excludes as justifiable the use of force in response to verbal provocation alone.²⁶ Although verbal abuse is not subject to civil or criminal sanctions, such verbal abuse nevertheless may lead to physical abuse.

A more tangible form of nonviolent abuse involves interference with property rights of the victim. This kind of abuse can literally strip away the financial resources of the victim, effectively bar costly legal remedies, and break down the victim's desire to pursue any action against the abuser. Interference with property rights can range from squandering community income to destruction of property.

C. *The Profile of Abusive Spouses*

A character profile of potential abusers is invaluable in assuring that these people and their victims will be identified and steered toward the legal resources created to assist them. Again, the contradictory data available suggest the need for additional information.

Dr. F.G. Bolton, Jr., a social scientist who has done considerable work in the field of spouse abuse, characterizes abusive families as of predominately lower socioeconomic status.²⁷ Dr. Bolton's theory of economic factors as a dominant feature of violent families is, however, contradicted by other researchers, who contend that spouse abuse transcends class and ethnic barriers, with professionals contributing as much to the problem as unskilled workers.²⁸

One recent study reveals that a simple characterization of

Kentucky women are estimated to have been severely abused at some time. M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 13-15 (1979).

25. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 446-49 (1969) (holding Ohio Criminal Syndicalism Act unconstitutional on first amendment grounds because it failed to distinguish between mere inflammatory speech and incitement of imminent lawless acts).

26. TEX. PENAL CODE ANN. § 9.31(b)(1) (Vernon 1974).

27. Bolton, *The Domestic Violence Continuum: A Pressing Need for Legal Intervention*, 66 WOMEN LAW. J. 11, 13 (1980).

28. Hamlin, *The Nature and Extent of Spouse Assault*, 1978 VICTIM ADVOC. 10, 14; Comment, *Spouse Abuse*, *supra* note 6, at 149.

abusers is impossible.²⁹ Nonwhites, urban families, and younger families experienced spousal violence more often than other groups, but all classes, races, and backgrounds were represented.³⁰ Eleven percent of the women surveyed from lower income groups reported some violent incident during the past twelve months.³¹ Ten percent of women with family incomes between \$15,000 and \$24,999, and eight percent of women with family income of \$25,000 or more, reported such incidents.³² These figures show little correlation between income and violence. Education levels produced even more surprising results. The same study indicated that fewer acts of spousal violence occurred in families in which the husband had an eighth grade education or less than in those families in which the husband had finished high school or college.³³

If these characterizations reflect the true breadth of spouse abuse, no quick solution will emerge from concentration on either free urban legal services or formalized, expensive equitable procedures. Rather, the legal alternatives must reflect the diversity of the people involved.

D. Characteristics of Spouse Abuse

Factors frequently present in abuse situations also provide guidance for legal solutions. The first of these factors is that an incident of domestic violence is unlikely to be reported to police.³⁴ The refusal to report abuse may indicate a lack of confidence or trust in the ability of the police to handle the situation, a reluc-

29. M. SCHULMAN, *supra* note 24, at 17.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* Stereotypical conceptions about spouse abusers seem inaccurate in light of these results. The study concluded:

The collective portrait of the abusive and violence-prone family is hardly distinguishable from the profile of the average family on the street. While there is some tendency for these families to be urban, young, and nonwhite, violence-prone families are found across the broad social spectrum—middle class and lower class, nonwhite and white, urban and rural.

Id. at 18.

34. *Id.* at 36. Kentucky abuse victims who indicated a very high incidence rate revealed that only 9% of the incidents were reported to police. Nonwhite and lower-income victims filed reports more than twice as often as other victims surveyed, a fact that might explain the stereotypical view of the likelihood of abuse in those classes. Since the Kentucky survey dealt only with abused women, there is no indication of how many abused males fail to report abuse, but the figure may well exceed that of the nonreporting females. *Id.*

tance to invoke the sanctions of the criminal justice system, or a general desire to work out the matter within the family.

Another salient factor is the abuse of alcohol. Some researchers have estimated that from forty to ninety-five percent of abuse incidents involve alcohol.³⁵ A recent study of police response to abuse calls indicates that the police perceive alcohol as an important element in their decision to arrest.³⁶ Although alcohol has not been conclusively shown to be a primary contributor to physical abuse, sufficient evidence exists to indicate its importance. More study of the connection between alcohol and spousal violence is therefore essential.

A final and alarming observation about abuse is that it seems more likely to occur in families in which the victim was raised by abusive parents.³⁷ In one study, women recalling family violence towards their own mothers were themselves victims more often than women whose fathers rarely or never acted violently toward their mothers by a ratio of twenty-eight percent to seven percent.³⁸

E. The Societal Impact of Abuse

An often overlooked aspect of abuse is its economic cost. Societal response to abuse requires expensive services. In the legal system alone, law enforcement agencies, prosecutors, private attorneys, civil and criminal courts, courts of appeal, and the corresponding probation, parole, and clerical personnel attached to the system have become involved, often unwillingly, in the ramifications of abuse.

For instance, consider the economic impact of a relatively uncomplicated assault case. Police officers are called from other duties and, because of the danger that domestic calls present, two officers are required to respond. The offender, if arrested, must be jailed at public expense. A public prosecutor must prepare and possibly try the case. If any judicial disposition is made, additional administrative expenses are incurred by the probation office, correction facility, or the court. Civil actions also create judicial costs, although the parties usually bear more of the expense. Divorce ac-

35. Comment, *Wife Beating*, *supra* note 6, at 176.

36. Berk & Loseke, "Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances, 15 L. & Soc'y REV. 317, 339 (1981).

37. M. SCHULMAN, *supra* note 24, at 29; Taub, *supra* note 6, at 96; Comment, *Wife Beating*, *supra* note 6, at 177.

38. M. SCHULMAN, *supra* note 24, at 29.

tions, tort claims, custody hearings, or simple anxiety take their toll, as do losses of property or expendable income.

Spousal assault will not be as expensive to remedy as it is to tolerate. Abuse is not a minor inconvenience for those unfortunate enough to experience it: it is a monstrous social ill that shows every sign of spreading. Many states have taken steps to combat this problem, but no simple unilateral legislative approach will overcome this Hydra. Texas has delayed responding to this problem, and much remains to be done.

III. LEGAL INTERVENTION ALTERNATIVES

Currently, the broad categories of legal alternatives available to the abused spouse are criminal prosecution, civil remedies, and protective orders—a newly formed equitable device. The criminal justice alternatives include substantive and procedural criminal law designed for or adapted to abuse situations,³⁹ as well as the intervention of the police,⁴⁰ prosecutors,⁴¹ and courts⁴² in applying these laws and sanctions.

A. Civil Actions

No single approach to civil redress can provide a complete solution to spousal abuse. On the contrary, procedural, substantive, and practical problems make each approach inadequate in assisting some class of litigants. Yet, taken as a whole, the spectrum of civil alternatives offers important opportunities to protect and compensate the victim.

1. *Peace Bonds.* Peace bonds have often been issued in cases of family violence as an inexpensive and readily available deterrent.⁴³ Although a bond is essentially criminal in nature,⁴⁴ the parties and even the court issuing the bond may consider it as a civil remedy because there is no direct criminal sanction for its viola-

39. Refer to notes 89-109 *infra* and accompanying text.

40. Refer to notes 110-39 *infra* and accompanying text.

41. Refer to notes 140-43 *infra* and accompanying text.

42. Refer to notes 144-51 *infra* and accompanying text.

43. If the accused is required to post bond, he, as opposed to the victim, must pay the cost of the proceeding. TEX. CODE CRIM. PROC. ANN. art. 7.14 (Vernon 1977 & Supp. 1982-1983). The victim need only prove that there is just reason to believe that the threat will be carried out. *Id.* art. 7.03.

44. See *id.* arts. 7.01-.17 (procedure for obtaining and enforcing peace bonds).

tion,⁴⁵ and because the device is commonly employed prior to the commission of a violent criminal act.⁴⁶

As a practical matter, any remedy in the field of spousal abuse must be available quickly and inexpensively. Its availability must be widely known, and it must address the needs of the spouse requiring abuse protection. It is just this availability that has metamorphosed the peace bond into a common protective device for spousal assault.

Because peace bonds are usually administered by justice courts,⁴⁷ they are easily accessible.⁴⁸ The geographical distribution of such courts makes them the most convenient forum for judicial intervention.⁴⁹ In addition, the informality associated with the justice court encourages pro se filing and prosecution of petitions with minimal court costs. The resulting frequency of peace bonds as a violence control device insures that victims will know of the existence of this remedy and will seek it out in time of need.

Despite the availability of peace bonds, their effectiveness in deterring spousal assault is questionable. A peace bond is available as an alternative only when the spouse has threatened violence but has not actually acted upon the threat.⁵⁰ Undoubtedly, many spousal assaults begin with threats, but a large number begin with physical contact. A peace bond is an inappropriate remedy for past assaultive episodes. Addressing this situation, Texas law specifies that if evidence presented at a peace bond hearing indicates that the accused has actually committed a crime, he shall be tried for that crime.⁵¹ The bond may be forfeited to the state if its conditions are violated. Because the funds used to post the bond probably come from community property, the victim is essentially pay-

45. *Id.* arts. 7.13, 7.17. See Op. Tex. Att'y Gen. No. 0-6669 (1945).

46. When a peace bond issues, the accused is required to "keep the peace toward the person threatened or about to be injured" TEX. CODE CRIM. PROC. ANN. art. 7.03 (Vernon 1977).

47. Article 7.01 of the Texas Code of Criminal Procedure requires a magistrate to issue a warrant for the arrest of a person accused of threatening an offense against the person or property of another whenever the magistrate is informed upon oath of the threatened crime. *Id.* art. 7.01. This provision is mandatory upon any magistrate to whom sworn application is made. *Id.* However, custom has relegated this function almost exclusively to the justice court. See, e.g., *Cook v. State*, 537 S.W.2d 18, 19 (Tex. Crim. App. 1976).

48. Each county in Texas must have no fewer than four precincts, each with its own justice of the peace. TEX. REV. CIV. STAT. ANN. art. 2351, § 1 (Vernon 1971).

49. See generally *id.* §§ 1, 7 (authorization to establish courts).

50. TEX. CODE CRIM. PROC. ANN. art. 7.03 (Vernon 1977).

51. *Id.* art. 7.13.

ing a portion of the abuser's fine. Similarly, if the abuser is unable to post bond and is incarcerated, the potential victim must often suffer the loss of the abuser's income as well as face the unhappy prospect of the angered abuser's eventual release.

In spite of the difficulties inherent in the peace bond procedure and pattern of sanctions, the peace bond remains somewhat effective as a deterrent. The efficacy of any legal protection depends in large part upon its ability to shape behavior, and in this respect the peace bond has built an admirable record upon a weak foundation. Simply stated, it is the belief of the victim and the abuser in the procedure that makes it work. While hardly an imposing body in the context of the entire legal system, the justice court may well represent the only visible representative of social order with which the parties have been involved. Therefore, one cannot underestimate the effectiveness of such orders as practical and useful tools in deterring domestic violence, especially when divorce is not a desirable alternative.

2. *Divorce.* Divorce has been termed "[t]he most effective civil remedy" for spouse abuse⁵² and is often a logical response for a victim. But it is not always the remedy chosen.⁵³

In addition to the natural reluctance many feel toward divorce over what may be perceived as a temporary, sporadic, or relatively minor marital problem, victims avoid divorce for more practical reasons. These concerns include the expense of the proceedings, the lack of financial support, the unavailability of child care or shelter facilities, religious restrictions, and the fear of reprisal.⁵⁴

52. Comment, *Wife Beating*, *supra* note 6, at 187.

53. As one commentator stated:

[I]t is unreasonable to expect all women to seek divorce of their abusers. Some may believe it will be possible to control the violence and remain together; some may be opposed to divorce for religious reasons; and others may simply need breathing space to determine what they will ultimately do.

Taub, *supra* note 6, at 97-98. See also M. SCHULMAN, *supra* note 24, at 29; Comment, *Wife Beating*, *supra* note 6, at 177.

54. Unlike many states, Texas does not require fault grounds for divorce, TEX. FAM. CODE ANN. § 3.01 (Vernon 1975), thereby affording an option of privacy to the abuser and victim. In states requiring fault grounds, a spouse may endure considerable abuse before suit can be filed. Taub, *supra* note 6, at 99; Comment, *Spouse Abuse*, *supra* note 6, at 157. One assaultive incident may be insufficient to establish cruelty, and requiring a pattern of abuse increases the danger to the victim. Comment, *Spouse Abuse*, *supra* note 6, at 157. For states requiring fault grounds, see Comment, *Wife Beating*, *supra* note 6, at 187-88; Comment, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 158-59 (1977).

Financial inability is the major obstacle to divorce proceedings for perhaps most victims. Financial responsibility for children, community debts, or responsibility for maintaining community property may make divorce literally impossible regardless of the victim's willingness to divorce.⁵⁵ Attorneys usually charge fees based upon the professional effort expended and the complexity of the proceedings. A simple, uncontested divorce may be within the means of many, but the expense of restraining orders, counseling, investigations, and litigation often place the most effective aspects of divorce beyond the reach of victims of spouse abuse.

If the victim does seek a divorce, the abused spouse will usually attempt to have temporary orders entered during the pendency of the divorce proceeding. A temporary order may be issued to prevent physical or mental abuse of the spouse or children⁵⁶ and destruction or concealment of property.⁵⁷ Additionally, upon application for a temporary injunction and after notice and a hearing,⁵⁸ a court may order support payments or division of property, or may give one party exclusive possession of the family residence.⁵⁹

Additionally, the court may order counseling.⁶⁰ Unfortunately, the Texas statute provides such counseling solely for the purpose of determining whether reconciliation is possible.⁶¹ While this usually may be desirable, reconciliation is often undesirable in a family unit that has experienced abuse. Expansion of the statute to make counseling available, not for the sole purpose of reuniting the couple, but also to quantify and qualify the significance of the abuse involved, would be of greater benefit to victims.

Because they have such breadth of application, temporary orders or injunctions may prove especially effective in protecting a

55. Comment, *Wife Beating*, *supra* note 6, at 189-90.

56. TEX. FAM. CODE ANN. § 3.58(a)(1)-(5) (Vernon Supp. 1982-1983).

57. *Id.* § 3.58 (a)(6)-(10).

58. Act of June 17, 1983, ch. 424, § 1, 1983 Tex. Sess. Law Serv. 2348 (Vernon) (amending TEX. FAM. CODE ANN. § 3.58(b) (Vernon Supp. 1982-1983)) (to be recodified at TEX. FAM. CODE ANN. § 3.58(c)). Prior to the 1983 amendments to the Family Code, these remedies were available to applicants through a temporary restraining order without notice or hearing. *Id.* While the amendments decrease the breadth of the temporary restraining order, they do have the salutary effect of decreasing the requirements for granting an order. *Id.* (amending TEX. FAM. CODE ANN. § 3.58(e) (Vernon Supp. 1982-1983)) (to be recodified at TEX. FAM. CODE ANN. § 3.58(d)).

59. *Id.* (amending TEX. FAM. CODE ANN. § 3.58(b) (Vernon Supp. 1982-1983)) (to be recodified at TEX. FAM. CODE ANN. § 3.58 (c)).

60. TEX. FAM. CODE ANN. § 3.54(c) (Vernon Supp. 1982-1983).

61. *Id.* § 3.54(b).

spouse seeking a divorce in an abuse case. These orders and injunctions share a common denominator upon which their effectiveness turns: the court must be obeyed. A respondent who violates a temporary order or injunction may be held in contempt.⁶² However, the courts' reluctance to impose contempt may seriously undermine the victim's confidence in the protection seemingly offered by divorce.⁶³ Judges often hesitate to incarcerate or fine a violator if he promises to comply with the order in the future. In cases of subsequent disobedience, judges may impose sanctions, but probably not lengthy jail terms or large fines. Facilities and court time simply do not permit extensive imposition of sanctions.

In addition to the administrative burden of punishing every violation of a civil order, there are other justifications for the reluctance to impose sanctions. If a spouse violating a civil order is incarcerated, he will be unable to work and earn the money needed for support payments or his own maintenance. This loss of employment would only harm the abused spouse by diminishing the community estate. Ordering the payment of the victim's attorney's fees or assessing a fine would have a similar effect.

Some have suggested that this situation be remedied by allowing warrantless arrests for violation of injunctive orders. This does not, however, remove the obstacles to law enforcement.⁶⁴ Even if such arrests were permitted, courts would avoid fining or imprisoning first-time violators of orders, regardless of the severity of the violation, unless the court were convinced that the well-being of both the victim and the abuser would be served best by punishment. This assurance is frequently nonexistent. The most pro-

62. *Ex parte Valdez*, 521 S.W.2d 724, 727 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

63. Trent, *Wife Beating: A Psycho-Legal Analysis*, 65 WOMEN LAW. J. 9, 15 (1979).

64. A warrantless arrest based upon an alleged violation of an injunction differs considerably from an allegation of violation of a penal statute. In the case of the latter, the officer has a statutory provision against which to measure the actor's conduct, and, hopefully, training and experience in dealing with the factors constituting probable cause to believe a violation of the statute has occurred. Arrest based upon a court order presupposes the validity of the order and the proper interpretation of the order by the police officer. In neither of these determinations is the officer qualified by education or experience. Finally, it must be remembered that warrantless arrests for misdemeanors are strictly limited in Texas. See TEX. CODE CRIM. PROC. ANN. arts. 14.01-.06 (Vernon 1977 & Supp. 1982-1983). The punishment range for criminal contempt is similar to that of a misdemeanor offense. Compare TEX. REV. CIV. STAT. ANN. art. 1911a (Vernon Supp. 1982-1983) (penalties for contempt) with TEX. PENAL CODE ANN. §§ 12.21-.23 (Vernon 1974) (penalties for misdemeanors).

ductive course for abused spouses may be to continue to obtain the most stringent and specific protection possible from temporary orders, but to keep in mind that they may need to resort to some process other than contempt to punish continued abuse.

3. *Tort Actions.* No one would seriously challenge the application of tort law to an assault committed upon a person by a stranger. But serious obstacles, often amounting to an absolute bar, arise when the parties are husband and wife. To understand denial of the tort remedy to an abused spouse, one must recall the legal relationship of husband and wife prior to 1844: the marriage merged the legal identity of the wife into that of the husband, and the parties became one.⁶⁵ This unity-of-marriage fiction swallowed the individual property rights of the wife, including the right to a cause of action. Since a person cannot sue himself, it followed logically that the wife, sharing the legal identity of the husband, could not sue her spouse.⁶⁶

All American jurisdictions passed the Married Women's Acts, sometimes known as the Emancipation Acts, during the middle of the nineteenth century.⁶⁷ These statutes were intended to recognize the property of each spouse and insure the right of the woman to sue and be sued in her own name for causes of action that might accrue to her individually.⁶⁸ However, even after passage of the Married Women's Acts, a vestige of this historical interspousal relationship remained. Based squarely upon the unity-of-marriage fiction, interspousal tort immunity barred a tort action, even for intentional torts, against a spouse,⁶⁹ regardless of whether the suit was brought during or after marriage.⁷⁰ In contravention of the intended result of the Married Women's Acts, interspousal tort immunity persists in some jurisdictions today.⁷¹

65. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122 (4th ed. 1971).

66. *Id.*

67. *Id.*; Comment, *The Battered Wife—The Legal System Attempts to Help*, 48 U. CIN. L. REV. 419, 421 (1979).

68. Comment, *supra* note 67, at 421.

69. *Id.* at 420-24.

70. W. PROSSER, *supra* note 65, § 122.

71. *Id.* A variety of justifications have been propounded for the continuance of the immunity. Preservation of the harmony of the home was often cited as a reason to bar actions. Some believed that spurious law suits would result, or that collusive suits would be brought to defraud insurance carriers. Still others felt that other remedies, like divorce or criminal prosecution, were available to the injured spouse, and critics worried that the tortfeasor might share in the proceeds of any insurance recovery awarded for the injury.

Texas adopted interspousal tort immunity in 1886 with the decision of the supreme court in *Nickerson v. Nickerson*.⁷² The *Nickerson* immunity, typifying the doctrine, prevented suits brought during or after the marriage by a wife against her husband in tort, whether committed negligently or intentionally.⁷³ *Nickerson* and subsequent Texas cases advanced three basic grounds for adoption of the immunity: disruption of marital tranquility, the adequacy of other forms of relief, and the problems presented by a wife recovering a judgment from community assets.⁷⁴

Though widely criticized, interspousal tort immunity remained the law in Texas until 1977 when the Supreme Court of Texas decided *Bounds v. Caudle*.⁷⁵ In *Bounds*, the husband had committed an intentional tort against his wife, causing her death.⁷⁶ The children of the deceased wife brought suit against the husband/assailant for wrongful death, and they ultimately prevailed in spite of the *Nickerson* rule. In deciding *Bounds*, the court did not completely overturn tort immunity but merely abrogated the immunity for intentional torts.⁷⁷ However, since an abused spouse suffers primarily from intentional assault, *Bounds* provides a useful remedy.

The award of community property to satisfy a tort judgment remains a potentially significant obstacle to interspousal litigation. On the most basic level, the problem may be reduced to two questions: (1) whether a tortfeasor should pay for his wrongdoing with funds in which the victim already has a community interest, and (2) once the judgment is paid, whether a tortfeasor should be able to share that judgment because it is community in nature.⁷⁸ Recent statutory changes arguably have relieved this concern,⁷⁹ but no in-

While all of these concerns are legitimate in the proper context, they were merely make-weight for continuing an immunity doctrine that patently defies public policy and has done so for over a hundred years. *See id.*

72. 65 Tex. 281, 283 (1886).

73. *Id.*

74. *Id.* at 283-84; *Latiolais v. Latiolais*, 361 S.W.2d 252, 253 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

75. 560 S.W.2d 925 (Tex. 1977).

76. *Id.* at 927.

77. *Id.*

78. For a good discussion of this problem, see generally Comment, *Interspousal Tort Immunity*, 30 BAYLOR L. REV. 291 (1978).

79. *See* TEX. FAM. CODE ANN. § 5.61 (Vernon 1975) (specifying that all community property is subject to liability for torts committed by either spouse during the marriage). This provision sets up the first serious obstacle to the effective application of *Bounds*. If a spouse brings suit against an abuser, the judgment will be paid, if at all, from the nonexempt assets of the community. In other words, the abuse victim may bear the expense of

terpretive decisions permit precise outcome prediction in an interspousal tort suit.⁸⁰

Interspousal tort actions have not become commonplace since *Bounds*,⁸¹ but their potential as a private compensatory mechanism remains intact. This alternative should not be overlooked simply because it lacks familiarity.

4. *Victim Compensation Legislation.* Private compensation systems are no longer the only available means of relief in Texas for some victims. In 1979, the Texas Legislature passed the Crime Victims Compensation Act⁸² to provide relief for those suffering a financial loss due to injury or death caused by criminal acts.⁸³ The Act was established to insure compensation of victims of violent crime from a fund established by the legislature and administered by the Crime Victims Compensation Division of the Industrial Accident Board.⁸⁴

The Crime Victims Compensation Act does not apply to most spouse abuse cases because denial of an application made under the Act is automatic if "the victim resided in the same household as the offender or his or her accomplice."⁸⁵ This language clearly evidences the legislative attitude that abuse victims differ from other crime victims. Whether this attitude is related to the apparent willingness of the abused spouse to continue the relationship or to concerns about the use made of any award is unclear. For those abuse victims who are separated or divorced at the time of the assault, a remedy under the Act remains a possibility.

The funding scheme for a public compensation act specifically targeted for abuse victims might imitate the present Crime Victims

one-half of the judgment for the tortfeasor's conduct.

80. It is ironic that *Nickerson v. Nickerson*, 65 Tex. 281 (1886), also suggests a rationale for avoiding sharing the tort judgment. In *Nickerson*, the injured spouse could not recover from the joint tortfeasor spouse because of his immunity but was granted a recovery against a third-party joint tortfeasor. The court held the recovered damages were the separate property of the injured spouse, since allowing the husband to share in the judgment would reward him for his part in the tort. *Id.* at 285. This "forfeiture exception" to the general rule that such recoveries would be community property has remained, and is essential to the vitality of interspousal tort suits. See Comment, *supra* note 78, at 298-99.

81. For an example of one such interspousal tort case, see *Mogford v. Mogford*, 616 S.W.2d 936, 939-40 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

82. TEX. REV. CIV. STAT. ANN. art. 8309-1 (Vernon Supp. 1982-1983).

83. *Id.* § 2.

84. *Id.* § 14.

85. *Id.* § 6(c)(4).

Compensation Act. If court costs in criminal cases for assaults on spouses were the only available funds, the funding would probably be grossly inadequate because of our inability to identify such cases. But if the base of such funding were expanded to include the costs of suits resulting from the whole range of assaultive conduct, such funds could provide at least elementary support for abuse victims. Funding questions are basic to such proposals since the use of tax revenues may be politically impractical. The use of court costs is expedient because it places the burden of compensation on those committing the crime.

The philosophy that applauds funding by court costs would undoubtedly abhor one potential use of the compensating funds. Compensation paid to a victim should not be shared by the perpetrator of the assault. This possibility is, however, very real, especially if the abuser and victim are still married. *Nickerson v. Nickerson* provided a partial solution by characterizing the compensating funds as the separate property of the victim.⁸⁶ But no absolute assurance exists that the abuser will not benefit, directly or indirectly, from the compensation. This result is inevitable, and must be accepted as part of the price paid for assuring assistance to the victim.

Courts have often cited collusion between spouses as a reason for denying interspousal tort suits,⁸⁷ and this argument would surely be renewed if a compensated victim continued to live with an assailant. The prohibition on this arrangement in the current Act⁸⁸ reflects this concern. The only effective method of reducing the potential for collusion is to require the victim to divorce the assailant before compensating that victim. If, as the courts seem to believe, society is interested in maintaining the marriage regardless of its success, such a provision would prove unacceptable.

Procedural safeguards to prevent the improper application of the assistance could surely be found. For example, the compensation could take the form of direct payments for hospital and medical expenses, thus avoiding misappropriation of the funds by the abuser. Using funds to provide desperately needed counseling and vocational services would benefit only the victim. Similarly, providing shelter facilities and emergency food and clothing for abuse

86. 65 Tex. 281, 285 (1886).

87. W. PROSSER, *supra* note 65, § 122.

88. TEX. REV. CIV. STAT. ANN. art. 8309-1, § 6(c)(4) (Vernon Supp. 1982-1983).

victims would not assist the spouse abuser directly.

Private and public compensation schemes are the frontier of civil legal alternatives for abuse victims. Compensation does not relate to prevention or retribution in a philosophical sense, but it does extend the legal relief available to abuse victims.

B. Criminal Prosecution

An abuse victim may choose criminal prosecution, the second major available legal alternative. Unlike civil actions, prosecution is public in nature and depends largely upon those administering the various aspects of the criminal justice system for its effectiveness.

1. *Substantive Law.* The Texas Penal Code defines a variety of crimes against the person, many of which are applicable to abuse situations.⁸⁹ These include homicide,⁹⁰ assaults,⁹¹ threats⁹² and harassment,⁹³ and sexual abuse or rape.⁹⁴ The Code distinguishes between crimes by reference to culpability and the method of committing the assault.⁹⁵

The wide latitude of assaultive conduct recognized by the Texas assault statutes provides ample opportunity for prosecution of even the most minor injury.⁹⁶ Even threats to cause bodily in-

89. See generally TEX. PENAL CODE ANN. tit. 5 (Vernon 1974).

90. *Id.* § 19.01.

91. *Id.* § 22.01.

92. Refer to text accompanying notes 122-23 *infra*.

93. See Act of June 17, 1983, ch. 411, § 1, 1983 Tex. Sess. Law Serv. 2204 (Vernon) (amending TEX. PENAL CODE ANN. § 42.07(a), (b) (Vernon 1974)) (relating to written or telephoned harassment).

94. Sexual abuse or rape of a spouse has not been a criminal offense in Texas. TEX. PENAL CODE ANN. §§ 21.02, 21.04 (Vernon 1974). But recently passed legislation criminalizes spousal rape when a divorce action is pending or the spouses do not reside together. Act of June 19, 1983, ch. 977, § 3, 1983 Tex. Sess. Law Serv. 5311 (Vernon) (to be codified at TEX. PENAL CODE ANN. §§ 22.011, 22.021).

95. *Id.* § 22.02(c). Homicide and assault, the most serious physical forms of abuse, are punished by reference to aggravating factors, one of which is culpability. See generally *id.* §§ 19.01-.07. Culpability, under Texas law, is defined by circumstances. To kill another knowingly or intentionally is murder. *Id.* § 19.01(a). However, if the victim provoked the assailant, giving adequate cause for an act of passion, the crime is manslaughter. *Id.* § 19.04(a). Under this statutory scheme, a homicide may be classified as anything from criminally negligent homicide to murder, depending on the method of commission and the mens rea accompanying the act. *Id.* §§ 19.02, 19.07. Similarly, assault punishments range from a small fine to felony sentences. *Id.* §§ 19.02(a)(1), 22.01(a)(3).

96. See generally *id.* §§ 22.01-.08. For example, reckless infliction of bodily injury suffices for class A misdemeanor assault. *Id.* § 22.01(a)(1).

jury constitute an assault,⁹⁷ as do, of course, threats of a more serious nature.⁹⁸ Written or telephone harassment may also be subject to criminal prosecution if it is impermissibly annoying or alarming to the recipient.⁹⁹

Community property law plays havoc with criminal prosecution for destruction or damage of the property of one spouse by another. Since most property crimes require that the interference with property be committed without the effective consent of the owner, prosecution of a spouse for damage or destruction of property in which the actor has a community interest presents serious difficulties.¹⁰⁰

If one looks no further than to the substantive law, the tools available to law enforcement should have long ago reduced the problem of spouse abuse to insignificance. Since this is manifestly not the case, and since such laws have generally been available for a considerable time, one may surmise that the deterrence value of these measures is low. Deterrence is not, however, improved by simply increasing the penalties for abuse related offenses or segregating spouse abuse as a specific crime.

Some states do consider spouse abuse a separate criminal offense.¹⁰¹ The penalties in these states range from misdemeanor to felony and precondition their application on proof of various physical abuses.¹⁰² One of the oldest such laws is the California statute which has been in effect since 1945.¹⁰³ The California approach has

97. "Bodily injury" includes physical pain, illness, or any impairment of physical condition. *Id.* § 1.07(a)(7).

98. *Id.* § 22.07(a)(2).

99. Act of June 17, 1983, ch. 411, § 1, 1983 Tex. Sess. Law Serv. 2204 (Vernon) (amending TEX. PENAL CODE ANN. § 42.07(a), (b) (Vernon 1974)).

100. Section 28.05 of the Penal Code attempts to remove this impediment by statutorily denying the defense that the actor has an interest in the property damaged or destroyed if another person also has an interest that the actor is not entitled to infringe. TEX. PENAL CODE ANN. § 28.05 (Vernon 1974). Unfortunately, this section pertains only to Chapter 28 of the Code, and deals with damage or destruction exclusively. It is doubtful that such a provision is of much use when one spouse wants to harm the other by destroying community belongings, since the police would be placed in the untenable position of trying to determine the ownership interest of the defendant in the property and the ratio that such interest bears to the total value. *Id.* § 28.06. It is by determination of such values that the seriousness of the crime is assessed in Texas. Even if law enforcement officials were willing to accept such a task, the undesirability of allowing them to do so is evident.

101. See generally J. HAMOS, STATE DOMESTIC VIOLENCE LAWS AND HOW TO PASS THEM 37 (1st ed. 1980); Comment, *supra* note 67, at 427.

102. J. HAMOS, *supra* note 101, at 36-37.

103. CAL. PENAL CODE § 273.5 (West Supp. 1983). One commentator on the deterrent value of the California approach has found little to engender hope:

hinged upon one spouse (originally the husband) causing a "traumatic condition" in the other by reason of abuse.¹⁰⁴ The courts interpreted this language to mean that bruises or other signs of abuse must be visible.¹⁰⁵ The problems of proof in such a requirement are obvious and deny the comprehensive coverage desirable in any such legislation.¹⁰⁶

To date, Texas has avoided recognition of spouse abuse or family violence as a distinct crime,¹⁰⁷ preferring to maintain these prosecutions as if the parties were strangers. In 1979, the Texas Legislature did, however, reinforce the applicability of the assault statutes to domestic violence by amending the laws to include the phrase, "including his spouse," in the basic assault language.¹⁰⁸ The legislature also added changes to the Code of Criminal Procedure that require police to protect those threatened by abuse.¹⁰⁹

Despite their shortcomings, criminal sanctions remain an essential weapon in the arsenal against spouse abuse. They undeniably deter some abuse and contain the potential to deter more. The severity of the punishment is not paramount; rather, the availabil-

As an attempt to overcome these non-interventionist policies California has made spouse abuse a specific statutory felony. Despite the codification of spouse abuse as a specific felony, however, California's criminal law remedy for victims of abuse appears vulnerable to police and judicial conciliatory tactics. Particularly, judges remain reluctant to sentence an abusive husband, a predisposition exaggerated by the legal requirement of establishing a "traumatic condition" from evidence that rapidly disappears. Statistics reiterate the dilemma faced by abused spouses. Since fewer than one in six felony arrests for wife or child beatings results in conviction and the incidence of familial violence remains high, the statute has little deterrent effect. Thus statutorily proscribing spouse abuse appears an imperfect solution to the problem.

Comment, *Spouse Abuse*, *supra* note 6, at 156-57.

104. A person in California is guilty of a felony if he "willfully inflicts upon his or her spouse . . . corporal injury resulting in a traumatic condition." CAL. PENAL CODE § 273.5 (West Supp. 1983).

105. *People v. Burns*, 88 Cal. App. 2d 867, 873-74, 200 P.2d 134, 137-38 (1948).

106. Speaking of the California statute, one writer observed: "The statute is in force, but its application presents some problems which have yet to be resolved. Physical injuries still must be present, but many husbands are adept at hitting their wives in places where bruises will not show." Comment, *Wife Beating*, *supra* note 6, at 199.

107. Although the Texas Family Protection Act initially included wording suggesting that it may be a crime to violate a protective order, the original statute never actually made the violation criminal. TEX. FAM. CODE ANN. § 3.58(e) (Vernon Supp. 1982-1983). Violation is now criminal. Act of June 19, 1983, ch. 631, § 3, 1983 Tex. Sess. Law Serv. 4049 (Vernon) (to be codified at TEX. PENAL CODE ANN. § 25.08).

108. TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon Supp. 1982-1983).

109. See TEX. CODE CRIM. PROC. ANN. arts. 6.01, 6.02, 6.03, 6.05, 6.06 (Vernon Supp. 1982-1983).

ity of the substantive law, knowledge of its existence, and the law's swift and decisive application act as the most powerful deterrents. The strength of the criminal law remedy to abuse is determined by its availability in substantive form, the practical use of that law by police, the prosecution of violations, and the judicial disposition of such cases.

2. *Police Involvement.* Police officers are the first representatives of society to become involved in spouse abuse.¹¹⁰ In Texas, police officers have a statutory duty to prevent a "threatened injury"¹¹¹ by taking action whenever an injury to a spouse or another is about to occur.¹¹² Statutory duties do not, however, describe the role played by police in abuse cases. To understand this interaction, one must consider the factors of circumstance, experience, and training that the police officer brings to an abuse call.

One such factor is the police officer's knowledge that he is about to become involved in one of the most dangerous situations in police work. Nationwide, nearly twenty percent of police deaths in the line of duty are attributable to domestic disturbance calls, and the number of fatalities among Texas officers is nearly as high.¹¹³ Knowing the danger attached to these calls, the police might be expected to answer such calls slowly, giving the situation time to subside and, hopefully, resolve itself before their arrival.¹¹⁴ Nevertheless, police response times do not appear to reflect widespread apathy or avoidance.¹¹⁵

Once on the scene, the police officer may opt to reconcile the couple, thereby avoiding escalation of the situation or increased danger to the officer. If the officer is skilled in mediation, this conciliatory tactic may prove satisfactory. As the skill of the officer or the willingness of the abuser to be reconciled decreases, the likelihood of successful mediation also diminishes.

Arrest is often the only alternative to mediation. A recent study by Sarah Berk and Donileen Loseke assessed the determinative factors in the arrest decision and yielded interesting results.¹¹⁶

110. Berk & Loseke, *supra* note 36, at 318.

111. TEX. CODE CRIM. PROC. ANN. art. 6.05 (Vernon Supp. 1982-1983).

112. *Id.* art. 6.06.

113. Trent, *supra* note 63, at 12; Comment, *Wife Beating*, *supra* note 6, at 185; Comment, *supra* note 67, at 424.

114. Berk & Loseke, *supra* note 36, at 335.

115. M. SCHULMAN, *supra* note 24, at 40.

116. Berk & Loseke, *supra* note 36, at 329.

The authors found four variables that produced statistically significant effects.¹¹⁷ The most important of these factors was whether the victim would sign a "citizen's arrest" warrant for the police.¹¹⁸ While this procedural device is not used in Texas, many agencies employ the complaint form. For more serious cases, police departments may use sworn statements indicating that prosecution is desired.

Berk and Loseke also found that when both principals were present and the female alleged violence or the male had been drinking the probability of arrest rose.¹¹⁹ The female's allegation of violence produced a far higher incidence of arrest than did allegations of property damage or the mere presence of both principals at the scene when the police arrived.¹²⁰ It may be supposed that appeal to the protective instincts of the responding officer, taken with the continued possibility of abuse, resulted in the increased chances for arrest. Once the damage was done, the inclination to arrest declined, suggesting that police may also see criminal action as far more retributive than protective. When alcohol was in use and the principals remained on the premises, arrest was more likely.¹²¹

The fourth important factor in deciding whether or not to arrest seems to have a contradictory effect. If a female abuse victim alerts the police to the situation, arrest probability decreases by nearly twenty-one percent.¹²² One may speculate that the reason for the diminished arrest rate is the belief that someone able to call for assistance is not so seriously in trouble as someone for whom help must be summoned.¹²³

Until recently, the Texas Code of Criminal Procedure pro-

117. *Id.* at 338. The four variables are "citizen's arrest," "female calls police," "both principals present x male drinking," and "both principals present x female only alleges violence." *Id.*

118. *Id.*

119. *Id.* at 339.

120. *Id.*

121. *Id.* Berk and Loseke characterized the significance of this statistic in the following way:

Not only does intoxication suggest the continued volatility of the situation, and thus no immediate solution to the disturbance, but it may also lead to a more convenient arrest charge (e.g., resisting or assaulting an officer) as an alternative to a charge of spouse abuse.

Id.

122. *Id.* at 340.

123. *Id.*

scribed virtually all warrantless misdemeanor arrests for offenses not committed within the view or presence of the arresting officer.¹²⁴ Warrantless felony arrests are permissible,¹²⁵ but felony offenses, particularly aggravated assaults, occur with far less frequency than misdemeanor assaults.

The Texas Legislature amended article 14.03 of the Code of Criminal Procedure during its 1981 session.¹²⁶ The amendment permits a peace officer to make a warrantless arrest when probable cause exists to believe that the suspect committed an assault resulting in bodily injury to another person and that immediate danger of further bodily injury to that person exists.¹²⁷

The approach of the statute is two-pronged, but the second prong is unresponsive to the realities of abuse. Abuse cases will rarely present a police officer with any difficulty in establishing probable cause to believe an assault resulting in bodily injury has occurred. The obstacle to application of this arrest power will come from the required probable cause to believe that immediate danger of further bodily injury exists.

A police officer responding to a domestic dispute in which the assault is over before his arrival may find the abuser has temporarily fled the scene. In this event, immediate danger of further injury is gone with the attacker. Similarly, if the abuser is still present when the officer arrives but denies any intention of continuing the abuse, facts may not exist to warrant an arrest.

A better procedural solution is found in statutes like the Washington one,¹²⁸ which omits the "immediate danger" requirement and permits warrantless arrests upon a showing of "physical harm or threats of harm to any person or property."¹²⁹ If police inaction inhibits implementation of the full deterrence of criminal law, that problem will not be relieved by proscribing arrests in

124. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon 1977).

125. *Id.* art. 14.03 (Vernon Supp. 1982-1983).

126. *Id.*, amended by Act of June 11, 1981, ch. 442, § 1, 1981 Tex. Sess. Law Serv. 1865 (Vernon).

127. TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 1982-1983). This kind of statute recently withstood an attack on equal protection grounds in Florida. *LeBlanc v. State*, 382 So. 2d 299, 300 (Fla. 1980).

128. WASH. REV. CODE § 10.31.100(1) (Supp. 1983-1984). The Washington provision states: "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property . . . shall have the authority to arrest the person." *Id.*

129. *Id.*

most situations and permitting it in only a few others.

To optimize the role of law enforcement in violent domestic situations, law enforcement agencies need to initiate certain procedural improvements. These improvements should include establishing a "good faith" defense for assault arrests involving family violence, increasing communication between social service agencies and law enforcement, establishing police data collection criteria for abuse cases, and developing police as a source of information for abuse victims. Added to expanded arrest capabilities and crisis intervention training, implementation of these measures would enhance the ability of law enforcement officials to control the spouse abuse problem.

Despite the recently expanded warrantless arrest procedures,¹³⁰ police remain reluctant to arrest. Officers' concern that an arrest of one family member at the request of another will lead to a false arrest or malicious prosecution suit against the officers contributes to this reluctance.

Victims often promise to pursue prosecution while the officer is present but then refuse to prosecute a few hours later. Knowing this, and realizing the vulnerability of his position as the outsider in this triangle, the officer has no illusions about the final loyalties of the complainant. With this in mind, and confronted with what is often an invisible injury to the victim, the officer may choose to ignore his statutory duty and avoid arrest, regardless of his sympathies.¹³¹ Texas lawmakers should, therefore, consider establishing a "good faith" defense for police officers enforcing assault laws against persons in the domestic setting. Such laws have been passed in other states to allay fears of civil liability for reasonable, good faith arrests of abusers.¹³²

Since the police are usually the first to learn of abuse cases, and are often the only agency to deal with the problem, logically recordkeeping should begin at that level. Currently, most police departments do not segregate records of domestic violence from other forms of assault.¹³³ Since many calls for assistance do not result in legal action, it is also vital for meaningful statistical col-

130. TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 1982-1983).

131. Comment, *supra* note 67, at 427.

132. N.C. GEN. STAT. § 14-134.3 (Supp. 1979); OR. REV. STAT. § 133.310 (1979). See Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59, 68 (1982).

133. J. HAMOS, *supra* note 101, at 7.

lection that information about such calls be kept in a form permitting easy retrieval and comparison. Police departments rarely keep such records.¹³⁴

This kind of information-gathering would assist problem solving only if it conformed to strict collection and dissemination criteria. Individual police departments should send data to a central state agency responsible for such statistical compilation and evaluation so that data may be fed back to the reporting agencies or those involved in planning within the systems concerned with abuse.¹³⁵ This central agency should release information only in statistical form to criminal justice, judicial, or social agencies for planning purposes.

The method of collection and dissemination of data must include measures to protect the privacy of the abuse victim. The legislature should enact express exemptions to the Open Records Act¹³⁶ to assure the privacy of abuse victims. This cannot, of course, prevent divulgence of the name of a complainant in a criminal case to the defendant or his attorney, but could curtail the present public accessibility of such information.

Police should be aware of what social service agencies are available and should refer victims to these resources. That rarely happens; however, when it does, it depends solely upon the industriousness of the individual officer. Clearly, the only efficient method of establishing this link between police and noncriminal justice resources lies with the agencies. From the practical standpoint, these social services must carry the responsibility of making themselves known to the police.

Several states have enacted legislation requiring police to furnish certain information to abuse victims.¹³⁷ This typically includes an outline of possible civil and criminal remedies, along with some statement of the officer's duties in providing medical assistance or protection.¹³⁸

The most common proposal for police education of abuse victims involves requiring officers to pass out cards containing statu-

134. *Id.*

135. The Domestic Violence Assistance Act proposed in the U.S. Senate in 1978 provided such a central clearinghouse of information within the Department of Health, Education and Welfare. S. 2759, 95th Cong., 2d Sess., 124 CONG. REC. 23,633 (1978).

136. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1982-1983).

137. See, e.g., MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1983-1984).

138. *Id.*

torily defined information.¹³⁹ This procedure is attractive in several respects. First, it places the burden of dissemination on the group most likely to recognize abuse situations and to whom victims most often may be expected to turn for assistance. Second, giving this task to police raises their level of recognition of the problem and affords them the means of helping the victim. Finally, informing the victim about the duties of the police leaves officers little room for avoidance of their responsibilities in the abuse situation.

3. *The Prosecutorial Role.* The prosecutor should answer legal questions from abuse victims. In some cities prosecutors have developed programs stressing the importance of abuse cases.¹⁴⁰ Specifically, the prosecution of abuse has been given priority in Seattle, Washington; Santa Barbara, California; Los Angeles, California; and Westchester County, New York.¹⁴¹ While the specific methods employed differ, the approaches used by each of these agencies alter the traditional methods of handling abuse and show that improved prosecution is possible.

Rather than filing abuse cases in the same way as other assaults, these innovative programs require that spousal assaults receive special attention. The prosecutors screen the cases initially to determine whether the victim will cooperate; then the extent and history of the assaultive behavior and the legal sufficiency of the case are examined.¹⁴² Special handling of abuse cases does not necessarily lead to acceptance of more cases for already burdened caseloads. It does, however, permit the rejection of cases at an earlier stage when it is clear that prosecution is undesirable or unsuitable.¹⁴³ The prosecutor should explain legal options to complainants at the same time he is evaluating victim cooperation. If the

139. Lerman, *Criminal Prosecution of Wife Beaters*, RESPONSE TO VIOLENCE IN THE FAMILY, Jan.-Feb. 1981, at 19; Trent, *supra* note 63, at 14. The police should only be required to provide information about the location and availability of legal assistance, medical care, shelter, and counseling services. Providing legal advice on a three-by-five card may mislead and potentially injure the victim. Information about the police role should be very general to retain flexibility in the police response; the police should not be bound to the black-and-white rules of arbitrary, printed instructions. Handled properly, the police-issued information card is a practical way to apprise victims of their recourse; it should not attempt to answer all of their questions.

140. For a more detailed discussion of several pilot projects, see Lerman, *supra* note 139, at 5.

141. *Id.*

142. *Id.*

143. *Id.*

prosecutor rejects the case, the complainant will understand better the deficiencies that led to the decision and be less likely to give up on the legal system. If a case survives the screening process, the complainant will also understand better what testimony is expected from the victim, how long the case will take to be tried, the punishment possibilities, and other legal alternatives to the problem. This screening process results in stronger cases for the prosecutor as well as prepared and willing complainants. Conviction rates would undoubtedly improve after such screening. Furthermore, persons whose cases were rejected would be less frustrated and might turn to appropriate social services for assistance.

Without care, overly aggressive prosecution can become insensitive prosecution and can be as damaging to the victim as the refusal to treat abuse seriously. For this reason, district and county attorneys should, if possible, assign specific investigators or prosecutors to handle spouse abuse cases. These people should be aware of the community resources available to victims and be available to assist in training police in this work. Even when it is impractical to assign specific personnel to work exclusively on abuse, these cases should not be handled routinely by every prosecutor on the staff or erratically assigned to the inexperienced members of the office. If the criminal justice system treats the prosecution of abuse as a priority, other segments of society may someday view it as a priority as well.

C. Dispositional Alternatives

Spousal assaults resemble any assault in the substantive sense, but one cannot equate the sanctions for family violence with societal needs in the prosecution of other crimes.¹⁴⁴ For the family unit to survive a criminal prosecution, the judge must recognize the impact a jail sentence will have. For example, if the defendant is the family breadwinner, confinement will punish the whole family by cutting off its source of income. This problem increases if the defendant loses his job as a result of the confinement. In this regard, imposition of a fine is less damaging to the family in the long run, although the immediate impact may be just as devastating.

But the disadvantages of incarceration do not mean that the judge should exclude it as a possible sanction in every case that

144. For a contrary view, see Trent, *supra* note 63, at 21.

economic detriment might occur.¹⁴⁵ In many such cases, the judge can sentence defendants to a county work-release program that enables the prisoner to attend his job during the day and return to a minimum security jail at night and during weekends.¹⁴⁶ This approach demonstrates to the prisoner the willingness of the court to order confinement while it recognizes the needs of the family and the responsibility of the offender to continue support.

Judges often prefer probation to incarceration because of the nature of the crime, the potential damage to the defendant and the overcrowding of jails. Unfortunately, if defendants routinely receive probation in abuse cases without consideration of the needs of the defendant and victim, probation may be worse than no punishment at all. Probation without conditions is a dangerous encouragement to further abuse. Instead, courts should work to condition probation if it is granted. The sentence should require the defendant to attend alcohol or drug abuse counseling,¹⁴⁷ spouse abuse counseling, or other counseling for problems contributing to the abuse. The court might also require the defendant to compensate the victim of the crime or pay for medical expenses incurred as a result of the assault,¹⁴⁸ and it should expressly prohibit further abuse.

The supervision of an abuser should begin long before sentencing. Conditioning pretrial release on terms like those frequently found in a temporary restraining order is one way to offer some protection to the victim.¹⁴⁹ While only a few states have passed specific statutes permitting judges to establish such conditions for release,¹⁵⁰ judges generally have broad discretion in this

145. *Id.*

146. Statutory work release is now possible in Texas for offenses punishable by confinement in a county jail or third degree felonies. Act of June 19, 1983, ch. 586, § 4, 1983 Tex. Sess. Law Serv. 3792 (Vernon) (to be codified at TEX. CODE CRIM. PROC. ANN. art. 42.03, § 6). Unfortunately, the amendment is of little practical use in abuse situations because it requires a jury finding that the defendant did not cause a bodily injury. *Id.* County work release statutes do provide that money earned by a prisoner be paid to the victim through the sheriff for support and restitution, an ideal scheme in abuse cases. *Id.* § 1 (to be codified at TEX. CODE CRIM. PROC. ANN. art. 42.03, § 6).

147. The magistrate setting bond may now require participation in a drug or alcohol abuse program as a condition of release. Act of June 19, 1983, ch. 551, § 1, 1983 Tex. Sess. Law Serv. 3206 (Vernon) (to be codified at TEX. CODE CRIM. PROC. ANN. art. 17.40); *id.* § 2 (to be codified at TEX. CODE CRIM. PROC. ANN. art. 22.021).

148. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6(m) (Vernon 1979).

149. Lerman, *supra* note 139, at 10; Comment, *Wife Beating*, *supra* note 6, at 192.

150. See Lerman, *supra* note 139, at 10. Under a new Texas law, probation officers may develop pretrial release programs and diversionary programs. Act of June 19, 1983, ch.

area. To reinforce and facilitate such measures, Texas needs specific statutory authorization for courts to condition the release of prisoners in spousal abuse cases on terms designed, at least, to protect victims from further abuse pending trial. For greater effectiveness, such a statute should also permit conditioning release on participation in rehabilitative programs. As a concomitant feature, the court might be permitted to divert the offender and eventually dismiss the case upon a showing of successful completion of a rehabilitative program.¹⁵¹

All of the methods suggested, from the pretrial stage to the sentencing stage, are tools of the court, prosecutor, and even the defense attorney. Working in the adversarial system, such diverse options can promote the punishment or rehabilitation of abusers while offering protection to victims.

D. Protective Orders

In 1979, the Texas Legislature established a separate civil procedure specifically dealing with some of the more common problems of abuse. This addition to the Family Code¹⁵² made protective orders, a form of injunctive relief, available for family violence situations when no divorce is pending. In adopting this measure, the legislature followed a national trend that has seen all but six states pass similar protective order statutes.¹⁵³

These statutes attempt to fill the void between divorce and other civil or criminal remedies for family violence. Although the details of the acts differ from state to state, most are essentially equitable in nature and merely codify the right of a person to obtain an injunction and certain ancillary relief where a divorce is

762, § 1, 1983 Tex. Sess. Law Serv. 4572 (Vernon) (amending TEX. CODE CRIM. PROC. ANN. art. 42.12, § 10(a) (Vernon Supp. 1982-1983)).

151. Besides work release, refer to note 145 *supra*, Texas law contains an additional applicable sentencing alternative. When alcohol has contributed to the abuse, as is often the case when an arrest has been made, misdemeanor judges, including municipal court judges, may remand a defendant to an authorized alcohol treatment facility for up to 90 days in lieu of imposition of sentence. TEX. REV. CIV. STAT. ANN. art. 5561c, § 12 (Vernon Supp. 1982-1983). This limited device lies dormant, waiting for application in appropriate cases, many of which are abuse-related. Its application should be expanded to include treatment of other contributory problems linked with abuse. This kind of treatment vehicle would go a long way toward eliminating the systemic reluctance to punish abusers.

152. TEX. FAM. CODE ANN. §§ 71.01-.19 (Vernon Supp. 1982-1983).

153. Lerman, *State Legislation on Domestic Violence*, RESPONSE TO VIOLENCE IN THE FAMILY, Aug.-Sept. 1980, at 1.

undesirable.¹⁵⁴ These acts make long-overdue attempts to deal specifically with abuse.

Under Title IV of the Texas Family Code, any member of a "family" or "household" is eligible to apply for protective orders.¹⁵⁵ This expansive approach includes anyone related by consanguinity or affinity including former spouses, foster children and parents, and persons living together in the same dwelling, even if unrelated.¹⁵⁶ The broad scope of eligibility greatly enhances the effectiveness of this measure by eliminating unrealistic restrictions.

In states limiting the eligibility for protective orders to married adults, many single cohabitants or former spouses suffer abuse without the same recourse afforded married persons. In Texas, framing the statute to include all such combinations not only rectified the harshness of narrow limitations, but avoided problematical interpretations of the common-law marriage status.

The inclusion of former spouses, children, parents, or even strangers living together in a single household appropriately addresses the variety of interpersonal assaultive conduct that destroys the lives of cohabiting groups. If such groups are the fabric of modern society, whether or not they resemble the traditional family unit, society's interests dictate the same protection to them that is accorded spouses.

A related concern is whether any person other than the victim of abuse may apply for relief. The Texas statute permits filing of an application by any adult member of a family or household for the protection of the filing adult or any other member of the family or household, including a child member.¹⁵⁷ This provision applies even if the person filing the application no longer lives in the same household as the alleged abuser.¹⁵⁸ While this procedure obviously benefits abused children and adult victims who are hospitalized, in hiding, or physically or financially incapable of filing for themselves, it also benefits those who are simply unsure of their

154. See, e.g., TEX. FAM. CODE ANN. §§ 71.01-.19 (Vernon Supp. 1982-1983) (protection of the family).

155. *Id.* § 71.01(b)(3), (4).

156. *Id.*

157. *Id.* § 71.04(b), amended by Act of June 19, 1983, ch. 607, § 2, 1983 Tex. Sess. Law Serv. 3857 (Vernon). An application may be filed for a child by any adult, whether or not a member of the household. *Id.* § 71.04(b)(2). The recent amendments to the Act allow any prosecuting attorney in the county court to file for protective orders for any person alleged to be the victim of family violence. *Id.* (to be codified at *id.* § 71.04(b)(3)).

158. *Id.* § 71.04(c).

desire to pursue a legal remedy. In this respect, Texas law is more accommodating than that of many states.¹⁵⁹

But, prior to the recent amendment of the Texas Family Code,¹⁶⁰ protective orders did not accommodate the class of victims who were in the process of obtaining a divorce. If the applicant filed for divorce, any application for a protective order was dismissed.¹⁶¹ To further this prohibition, every application required a statement that no suit for dissolution of the marriage was pending.¹⁶² Lawmakers apparently considered temporary orders adequate protection for parties in a pending divorce. Virtually no other state shared this position with Texas,¹⁶³ and the logic of this provision was not apparent. If a protective order was in effect before the divorce action was filed, there was no need to duplicate in the divorce court what had already been accomplished by the protective order. On a more elementary level, it seems unnecessary to have required an abuse victim to pay twice for the same result. The former Texas concept forced the applicant to choose between continued protection without pursuing divorce and vulnerability until divorce was granted.

Continued protection was also lacking when divorce was the first step. If the victim wanted protection during the pendency of the divorce, he obtained a temporary injunction which, in turn, was replaced with a protective order after the divorce was final.

The Texas Legislature amended the statute in 1983 to resolve this problem.¹⁶⁴ Under the current statutory scheme, a petitioner may request a protective order in the divorce court during pen-

159. Lerman, *supra* note 153, at 4-7.

160. Act of June 19, 1983, ch. 631, § 1, 1983 Tex. Sess. Law Serv. 4046 (Vernon) (to be codified at TEX. FAM. CODE ANN. § 3.581) (making protective orders available to a party seeking divorce upon motion as part of divorce action); Act of June 19, 1983, ch. 607, § 4, 1983 Tex. Sess. Law Serv. 3859 (Vernon) (amending TEX. FAM. CODE ANN. § 71.06 (Vernon Supp. 1982-1983)) (making applications for protective orders available to parties if filed before filing divorce action); *id.* § 5 (amending TEX. FAM. CODE ANN. § 71.13(b) (Vernon Supp. 1982-1983)) (making conflicting orders of court with jurisdiction over divorce or annulment proceedings prevail over conflicting orders of court with jurisdiction over parties in divorce suit—as in an application for a protective order filed prior to divorce proceedings—only to the extent of actual conflict).

161. TEX. FAM. CODE ANN. § 71.06 (Vernon Supp. 1982-1983), amended by Act of June 19, 1983, ch. 607, § 4, 1983 Tex. Sess. Law Serv. 3859 (Vernon).

162. TEX. FAM. CODE ANN. § 71.05(b) (Vernon Supp. 1982-1983).

163. Lerman, *supra* note 153, at 4-5.

164. Act of June 19, 1983, ch. 631, § 1, 1983 Tex. Sess. Law Serv. 4046 (Vernon) (to be codified at TEX. FAM. CODE ANN. § 3.581).

dency of the marriage dissolution.¹⁶⁵ Such an order remains valid until the court vacates or dismisses the suit or orders a final decree of divorce.¹⁶⁶ If a conflict arises between an order of the divorce court and any existing protective order, the order obtained in the court dissolving the marriage prevails.¹⁶⁷

Unfortunately, this amendment perpetuates, in part, the judicial inefficiency of the original statute. By terminating the protective order upon finality of the divorce or annulment decree, the law cuts off continued protection at a time when it may be needed most. The divorced abuse victim must then either initiate suit for another protective order or accept the risk that a former spouse will continue to be abusive.¹⁶⁸ It would be far more effective to permit the divorce court to choose whether to terminate a protective order. The statute will remain procedurally deficient until this change is made.

A protective statute may limit the types of abuse covered as well as the eligibility of applicants. Since the primary objective of the protective order is to prevent "family violence" as defined in the statute,¹⁶⁹ the statute should avoid over-restrictive definitions of violent behavior.

The Texas statute addresses only the "intentional" use of physical force. Lesser degrees of culpability are apparently beyond the scope of the protective order in Texas.¹⁷⁰ Similarly, "threatened" abuse is a form of "family violence" but "attempted" abuse is not.¹⁷¹ Nor is every form of sexual abuse of a child or adult within the statutory definition, since "physical force" is the determinative factor under the provision as now written.¹⁷² These anomalies might not have existed had the statute borrowed the

165. *Id.*

166. *Id.*

167. Act of June 19, 1983, ch. 607, § 5, 1983 Tex. Sess. Law Serv. 3859 (Vernon) (amending TEX. FAM. CODE ANN. § 71.13(b) (Vernon Supp. 1982-1983)).

168. Apparently, if the protective order is sought in a separate action prior to divorce proceedings, and no conflicting order is entered by the divorce court, then the protective order will not terminate upon finality of the divorce or annulment unless the court with jurisdiction over the separate action frames the order so to terminate. *Id.* § 4 (amending TEX. FAM. CODE ANN. § 71.06 (Vernon Supp. 1982-1983)) (making applications for protective orders available to parties if filed before filing divorce action).

169. TEX. FAM. CODE ANN. § 71.01(b)(2) (Vernon Supp. 1982-1983).

170. *Id.*

171. *Id.*

172. *Id.*

concept of "bodily injury" from the Texas Penal Code¹⁷³ to supplement the "physical force" requirement. For instance, if the statute also prohibited the infliction or attempted infliction of bodily injury, the emphasis on the result as well as the means would have permitted broader interpretation of proscribed acts.

To protect a victim from further abuse, the court must anticipate the ways the abuser might inflict physical or psychological mistreatment and shape its relief to avoid such a possibility. The abuser may try to circumvent the intent of the court's order by obeying the literal words of the order but imaginatively employing means calculated to continue the abuse. In its effort to prevent such circumvention, the court may use its past experience to advantage. Specifically, Texas law permits the court to prohibit the abuser from directly or indirectly communicating with the applicant or going to or near the residence, place of employment, or any other place where the applicant may be.¹⁷⁴ These measures usually work well in divorce cases and should prove broad enough to deal with the harassment that often accompanies physical abuse.

A vital part of the relief available is granting exclusive use of the family domicile to one of the parties.¹⁷⁵ The Texas statute contemplates diverse living situations and permits such orders whether the residence is jointly owned or leased by the parties, owned or leased by the party granted possession, or owned or leased by the party denied possession if that party has a child support obligation.¹⁷⁶

The court may augment the award of exclusive possession of the domicile by an order granting use and possession of any other specific community or jointly owned property to one of the parties¹⁷⁷ and prohibiting the transfer of such property by the parties during the pendency of the protective order.¹⁷⁸ This measure is

173. See TEX. PENAL CODE ANN. § 1.07(a)(7) (Vernon 1974).

174. TEX. FAM. CODE ANN. § 71.11(a)(1)(B), (C) (Vernon Supp. 1982-1983) (to be recodified at *id.* § 71.11(b)(2), (3)).

175. *Id.* § 71.11(a)(2).

176. *Id.* § 71.11(a)(2)(A)-(C).

177. *Id.* § 71.11(a)(6). This provision is especially important for at least two reasons. First, the victim of abuse has enough problems without having to find another place to live. If the applicant retains custody of children during the period covered by the protective order, the interests of the children are often best served by allowing them to remain with the parent in possession of the family residence. Second, the abuser rightly bears the financial and physical burden of a new residence.

178. *Id.* § 71.11(a)(1)(E) (to be recodified at *id.* § 71.11(a)(1)(B)).

often useful to prevent the kind of retaliatory actions associated with divorce and may assist in apportioning the property according to need.

Merely awarding an applicant the domicile and specific items of property, however, is not always sufficient.¹⁷⁹ If the abuser is not required to provide sufficient financial support to pay for necessities and housing, many applicants may be deterred from asking the court to order the removal of the abuser. The Texas statute permits support payments for a party or child of a party if an obligation to provide support exists.¹⁸⁰

Although this support provision does not apply to unmarried cohabitants, it contributes measurably toward the continued shelter and feeding of many victims. This approach may be preferable to an order to pay only the rent or house payment since it is broad enough to accommodate those victims who want to move from their former domicile and live in a new residence or in an abuse shelter.

In addition to making support and property awards, the court may require counseling with a social worker, family service agency, physician, psychologist, or other qualified person.¹⁸¹ Statutory provisions, however, do not require that fees for this treatment be paid by the abuser. Perhaps lawmakers considered such payments self-defeating, since the money would often come from community funds. The court should, however, be empowered to deal with each case individually, especially since no community fund impediment exists when the abuser and victim are not married.

Further, the Texas support provisions do not compensate the victim for damages resulting from the abuse. While the victim may bring a collateral suit for damages against the abuser, judicial efficiency would be increased if the court awarded compensation at the same time that it issued protective orders. The abuser should compensate the victim for medical care, lost wages, counseling, or other expenses without regard to the marital status or support obligation of the parties.¹⁸² With the abrogation of interspousal tort immunity in Texas, the victim of abuse is entitled to compensation for the results of intentional torts committed by the attacker.¹⁸³

179. See, e.g., Comment, *Spouse Abuse*, *supra* note 6, at 162.

180. TEX. FAM. CODE ANN. § 71.11(a)(4) (Vernon Supp. 1982-1983).

181. *Id.* § 71.11(a)(5).

182. J. HAMOS, *supra* note 101, at 23.

183. Refer to notes 82-88 *supra* and accompanying text.

Clearly, courts should settle this claim in the most expeditious and judicially economical manner possible.

The Texas act does not allow the court to order the abuser to pay court costs or attorney's fees.¹⁸⁴ The availability of attorney's fees for successful claimants under the Texas Crime Victims Compensation Act highlights the inequity of this limitation.¹⁸⁵ If the state must repay costs and fees, surely a private party should bear this responsibility when there is evidence of wrongdoing. The effect of the Texas act's failure to provide for such recovery is the effective denial of relief to those unable to pay.¹⁸⁶

Finally, in a broad grant of equitable power, a Texas court may prohibit specific acts by an abuser to prevent or reduce the likelihood of further family violence.¹⁸⁷ Proper use of this provision may anticipate and deter specific violent, threatening, or harassing conduct.

Protective orders have been available in Texas for over four years, but, like tort actions, there have been relatively few applications for this remedy. One explanation for the limited use of this protective device may be the lack of procedural effectiveness and efficiency inherent in the legislation.

Requiring formality in a petition seeking damages in major business litigation probably does not affect the availability of such relief, while the same formality required in a petition for protective orders could effectively preclude availability of the remedy to those it is intended to help.¹⁸⁸ Not all abuse victims are unable to pay for representation, but it is obvious that many victims of abuse will be unable to finance even the least expensive kinds of assistance. Although pro se filing of applications for protective orders is permitted under the Texas statute,¹⁸⁹ an abuse victim acting pro se will

184. Many other states provide such relief. Lerman, *supra* note 153, at 4-5.

185. TEX. REV. CIV. STAT. ANN. art. 8309-1, § 12 (Vernon Supp. 1982-1983).

186. If a prosecuting attorney obtains a protective order for the victim, the abuser may be ordered to pay costs and attorney's fees to the government, but costs and fees remain unavailable for private practitioners. Act of June 19, 1983, ch. 607, § 2, 1983 Tex. Sess. Law Serv. 3858 (Vernon) (to be codified at TEX. FAM. CODE ANN. § 71.04(e)). Note that filing fees or other court costs may be waived for an applicant other than a prosecuting attorney upon a showing that the applicant is unable to pay. *Id.* (amending TEX. FAM. CODE ANN. § 71.04(d) (Vernon Supp. 1982-1983)). Refer to notes 194-96 *infra* and accompanying text.

187. TEX. FAM. CODE ANN. § 71.11(a)(7) (Vernon Supp. 1982-1983).

188. Lerman, *Civil Protection Orders: Obtaining Access to Court*, 3 RESPONSE TO VIOLENCE IN THE FAMILY Apr. 1980, at 1.

189. TEX. FAM. CODE ANN. § 71.05 (Vernon Supp. 1982-1983), amended by Act of June 19, 1983, ch. 607, § 3, 1983 Tex. Sess. Law Serv. 3858 (Vernon).

have difficulty invoking the equitable power of the court and understanding and selecting suitable relief under the law.¹⁹⁰ The Texas law governing application for protective orders has established clear and relatively uncomplicated requirements.¹⁹¹ Considering the rather limited relief options available,¹⁹² form applications should suffice at least to initiate an action.

Other states have aided applicants for protective orders by preparing form petitions, requiring court clerks to assist applicants with filing, and advising victims of their right to such relief at the police and prosecutorial levels.¹⁹³ Form petitions do not, of course, eliminate the need for competent professional representation in these proceedings. Nevertheless, the use of form applications and orders should reduce the cost of legal assistance since legal fees depend on the amount of work required in a specific case.

Tacitly acknowledging this cost factor, the legislature originally set the filing fee for protective orders at sixteen dollars.¹⁹⁴ This effort was praiseworthy but inadequate to accomplish its purpose. The legislature amended the fee provision in 1983 to permit waiver of filing fees and costs upon a showing of inability to pay.¹⁹⁵ Further, an applicant is entitled to a hearing on indigency within three days of the filing of a request for waiver of fees and costs, eliminating much of the potential for delay in a waiver procedure.¹⁹⁶

Providing legal assistance for those unable to pay may be more important than alleviating costs. If the legislature does not simplify the application or authorize clerical assistance from the court, some form of professional help is essential. Legal Aid or other forms of free clinical assistance are vastly overburdened.¹⁹⁷ While such assistance might eventually become available, it would probably come too late to meet the more immediate needs of serious

190. See Lerman, *supra* note 188, at 1.

191. TEX. FAM. CODE ANN. § 71.05 (Vernon Supp. 1982-1983), amended by Act of June 19, 1983, ch. 607, § 3, 1983 Tex. Sess. Law Serv. 3858 (Vernon).

192. *Id.* § 71.11, amended by Act of June 19, 1983, ch. 631, § 2, 1983 Tex. Sess. Law Serv. 4047 (Vernon). Refer to text accompanying notes 200-20 *infra*.

193. See Lerman, *supra* note 188, at 1; Lerman, *supra* note 153, at 6-7.

194. TEX. FAM. CODE ANN. § 71.04(d) (Vernon Supp. 1982-1983), amended by Act of June 19, 1983, ch. 607, § 2, 1983 Tex. Sess. Law Serv. 3858 (Vernon).

195. Act of June 19, 1983, ch. 607, § 2, 1983 Tex. Sess. Law Serv. 3858 (Vernon) (amending TEX. FAM. CODE ANN. § 71.04(d) (Vernon Supp. 1982-1983)).

196. *Id.*

197. Lerman, *supra* note 188, at 1.

abuse victims. The overcrowding of free legal services testifies eloquently to the need for such services. Since there is little chance that court-appointed attorneys will become routine in civil cases in the near future, only one apparent alternative remains. The prosecutor who represents the victim in the criminal abuse case should also handle the protective order.¹⁹⁸ No doubt prosecutors would oppose the addition of protective orders to their already heavy workload, but no other alternative appears to protect the rights of the victim. It makes economic sense to spend part of the prosecutorial budget on protective orders, since these orders should reduce the criminal caseload of spousal assaults.

The 1983 Texas Family Code amendments facilitate prosecutorial involvement. Specifically, a prosecuting attorney may file an application for a protective order and recover attorney's fees payable to the fund from which salaries are paid to prosecutors.¹⁹⁹

The 1983 amendments greatly improve the potential availability of protective orders, but until the problems of filing applications, paying court costs, and making representation available are resolved in favor of the victim, the Texas statute is effective only for those most likely to have the entire range of civil and criminal remedies already at their disposal. When the procedural requirements for protective orders become as simple and inexpensive as those for peace bonds, protective orders will assume the same role with much greater potential benefit to the applicants.

1. *Ex Parte and Emergency Relief.* The effectiveness of a protective device rests upon the speed and ease with which an applicant can obtain it, and Texas law only partially meets that test. The Texas statute does not permit emergency orders to be issued at times when courts are typically not in session. If the offender is arrested, there are still no guarantees that the abuser will not be released on bond before the victim can obtain any temporary orders or other protection.

The applicant can obtain emergency orders if there is a "clear

198. *Id.*

199. Act of June 19, 1983, ch. 607, § 2, 1983 Tex. Sess. Law Serv. 3858 (Vernon) (to be codified at TEX. FAM. CODE ANN. § 71.04(b)(3), (e)). Regarding which prosecuting attorneys may file on behalf of an applicant, the amendments allow any prosecuting attorney to file "who serves the county in which the application is to be filed and who represents the state in a district or county court for the protection of any person alleged to be a victim of family violence." *Id.* (to be codified at TEX. FAM. CODE ANN. § 71.04(b)(3)).

and present danger" of family violence, and the court may issue such orders *ex parte*.²⁰⁰ The application must contain facts concerning the violence and the need for immediate protective orders, and it must be verified under oath by the applicant, a process similar to that of application for a temporary restraining order in a divorce.²⁰¹

Unfortunately, the law fails to specify a method for having an emergency order granted on weekends or holidays, late at night, or when the court is not sitting. While some populous counties in Texas may have judges willing to be contacted at home to issue such orders, many districts have only one judge serving many counties, and he may not be available for several days.

If the victim does obtain an *ex parte* order, it is valid for only twenty days,²⁰² though it may be extended on the motion of the applicant or on the court's own motion for further twenty-day periods as necessary.²⁰³ This procedure may possibly violate due process because it potentially deprives the respondent of property for an indefinite time without a hearing. The respondent must file a motion to vacate an *ex parte* order to bring the matter to a hearing on the merits.²⁰⁴ This places the burden of setting the case for hearing on the respondent, which may cause injury if the respondent is unable for some reason to file such a motion.

2. *Duration of Orders.* When the court has heard the application for a protective order, it may enter an order granting relief for any period up to one year.²⁰⁵ Any party or the court itself may move to modify in any respect, except to extend the order's duration.²⁰⁶ Although a second protective order is presumably available to an applicant immediately upon the expiration of the first, the first order terminates by operation of law.²⁰⁷ This relieves the parties of the need to move for termination of the order. In addition, the police and other agencies involved in the enforcement of the order can quickly determine the termination date even if no date appears in the court's order.

200. TEX. FAM. CODE ANN. § 71.15(a) (Vernon Supp. 1982-1983).

201. *Id.* § 71.05(e).

202. *Id.* § 71.15(b).

203. *Id.* § 71.15(c).

204. *Id.* § 71.15(e).

205. *Id.* § 71.13(a).

206. *Id.* § 71.14.

207. *See id.* §§ 71.13-14.

3. *Enforcement.* Enforcement of the protective order is essential. If there is no swift and sure method of punishing violations of the order, it is unlikely to deter abusers. The two principal methods of enforcing such orders are contempt and criminal sanction. The drafters of the Texas statute obviously attempted to incorporate both approaches, but without success.

The Texas law specifically requires that the following language be included in every protective order and that it appear in bold-face type or capital letters:

A person who violates this order may be punished for contempt of court by a fine of as much as \$500 or by confinement in jail for as long as six months, or both.²⁰⁸

Although this kind of warning is unusual, the idea is meritorious because the written threat of punishment is a constant and clear reminder to the person restrained.

Contempt alone is insufficient to enforce protective orders for the same reasons discussed in connection with restraining orders and temporary injunctions.²⁰⁹ The mere availability of contempt as an enforcement tool may even diminish punishment for violations. If a protective order is in effect and the violator commits an act that would otherwise be a felony or class A misdemeanor assault, the court will be reluctant to prosecute if it can opt for contempt proceedings. Unfortunately, the most serious punishment prescribed for criminal contempt is far less than that prescribed for any but the least serious assault.²¹⁰

A contempt hearing may be scheduled weeks after the violation and has many of the attendant disadvantages of a criminal trial. Delays in contempt proceedings substantially increase a risk of continued violence. Additionally, prior to the 1983 amendment, Texas law did not empower police agencies to arrest for violation of a protective order.²¹¹ Some states resolved this problem by making violations indirect criminal contempt for which police may

208. *Id.* § 71.16(a).

209. Refer to notes 62-64 *supra* and accompanying text.

210. See Eisenberg & Seymour, *An Overview of Legal Remedies for Battered Women*, TRIAL, Aug. 1979, at 28, 29. Compare TEX. REV. CIV. STAT. ANN. art. 1911 (Vernon 1964) (district courts may punish for contempt by fine not to exceed \$100 and by imprisonment not to exceed three days) with TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 1982-1983) (classifying some assaults as class C misdemeanors) and TEX. PENAL CODE ANN. § 12.23 (Vernon 1974) (class C misdemeanor punishable by fine not to exceed \$200).

211. Refer to notes 214-19 *infra* and accompanying text.

make a warrantless arrest.²¹² In Pennsylvania, the offense need not occur in the presence of the police and there is no right to trial by jury for the violation.²¹³

The old Texas statute attempted to involve police agencies in the enforcement of protective orders in an unusual way. The law required, in addition to the language warning of contempt penalties, that each protective order contain the following wording:

A violation of this order by commission of family violence *may* be a criminal offense punishable by a fine of as much as \$2,000 or by confinement in jail for as long as one year, or both.²¹⁴

This wording created confusion concerning the legislative intent. The language did not create a crime because it merely implied that the conduct was criminal. It was also possible to interpret the warning of criminal prosecution as simply a restatement of the possible penalties for assault existing in the Texas Penal Code. If so, this caveat was seriously inaccurate because it described only one misdemeanor assault penalty range when other misdemeanor or felony assaults might be involved.²¹⁵ This tacit degrading of all levels of assault to a lesser penalty range misled the very person it meant to deter.

Finally, in 1983, the legislature amended the penal code by adding a provision specifically criminalizing the intentional or knowing violation of a protective order.²¹⁶ The offense entails an act of family violence, direct communication with a member of the family or household in a threatening or harassing manner, or presence at or near the residence or place of employment in violation of a protective order.²¹⁷ Any of these violations of the protective order is punishable as a class B misdemeanor,²¹⁸ and the offender remains subject to prosecution for any crime committed while violating the order.²¹⁹

This change in the law clarifies the language required in the

212. Comment, *Spouse Abuse*, *supra* note 6, at 163.

213. See, e.g., PA. CONS. STAT. ANN. § 10190(a), (c) (Purdon Supp. 1983). See also Comment, *Spouse Abuse*, *supra* note 6, at 163.

214. TEX. FAM. CODE ANN. § 71.16(b) (Vernon Supp. 1982-1983) (emphasis added).

215. See TEX. PENAL CODE ANN. § 22.01(b) (Vernon Supp. 1982-1983) (allowing some assaults to be tried as felonies).

216. Act of June 19, 1983, ch. 631, § 3, 1983 Tex. Sess. Law Serv. 4049 (Vernon) (to be codified at TEX. PENAL CODE ANN. § 25.08).

217. *Id.* (to be codified at TEX. PENAL CODE ANN. § 25.08(a)(1)-(3)).

218. *Id.* (to be codified at TEX. PENAL CODE ANN. § 25.08(d)).

219. *Id.* (to be codified at TEX. PENAL CODE ANN. § 25.08(c)).

protective order, but it has a far more important function. It finally provides police the statutory authorization to arrest those who violate a protective order rather than relegating enforcement to contempt proceedings. Whether police agencies will increase enforcement in abuse cases because of this amendment remains to be seen, but the law is now procedurally complete.

The Texas law instituting protective orders already had one necessary predicate to unsupervised enforcement by the police. The statute required all municipal police departments and sheriffs to establish procedures to insure that officers have access to the names of persons protected by such orders.²²⁰ This requirement heightened police sensitivity to abuse cases and insured the availability of vital information to the officer in the field. Procedures enabling officers to contact judges or court personnel supervising protective orders would improve this data flow. Judges are commonly called upon to set bonds and arraign prisoners at inconvenient times; only slight additional attention is needed to provide the judicial supervision necessary to enforce these orders.

IV. CONCLUSION

The primary purposes of legal remedies to spouse abuse should be deterrence, protection, and compensation, in that order. In achieving these goals, no single alternative examined provides completely effective relief.

To be effective, the chosen remedy must also be readily available. Therefore, procedure must complement the substantive goals of any legal mechanism designed to aid victims or combat abuse. Although laws requiring numerous hearings, service of citation, formal pleadings, and professional counseling may further desirable goals, they also nullify the remedy for many abuse victims who cannot afford such procedures. While not every remedy need be available to every victim, every victim should have access to sufficient and comprehensive relief from abuse. That goal is far from being realized.

The goals of economy and effectiveness suggest that priorities should be assigned to abuse remedies. If possible, the law should deter the potential abuser, and this focus must remain primary. Where deterrence fails, as it must in some cases, effective protec-

220. TEX. FAM. CODE ANN. § 71.18 (Vernon Supp. 1982-1983).

tion of the potential victim becomes paramount. If law and society fail in these goals, compensatory and rehabilitative measures must be available. The essential challenge is to provide legal systems that are both effective and accessible.

Each remedial alternative bearing upon spouse abuse should be strengthened, but particular attention should be paid to affording quick, sure, and readily available legal assistance to the vast number of people affected by abuse. It is hard to imagine any larger class of victims in such urgent need who have traditionally received so little assistance from the law. The Family Protection Act recognized that need in Texas, but one simple legislative stroke cannot resolve a problem of the proportions of spouse abuse.